

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

4-14-77

77-50002

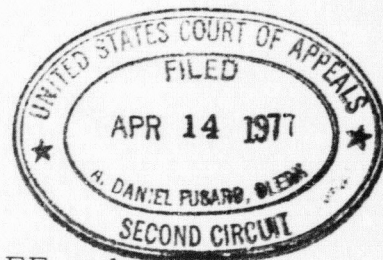
UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

**ORIGINAL
WITH PROOF
OF SERVICE**

In Re:

W. T. GRANT COMPANY,
Bankrupt.



PAUL S. BERGER, Trustee, and RONALD M. LEE and
SUTRO MORTGAGE INVESTMENT TRUST, individually
and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

CHARLES G. RODMAN, Trustee in Bankruptcy of
W. T. GRANT COMPANY, Bankrupt,

Defendant-Appellee.

On Appeal From a Memorandum Opinion and Order of the
United States District Court for the Southern District of New York

SUPPLEMENTAL APPENDIX

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(6243)

PAGINATION AS IN ORIGINAL COPY

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NOTICE OF MOTION TO DISMISS APPEAL FROM ORDER
OF BANKRUPTCY COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	In Bankruptcy
	:	No. 75 B 1735
W. T. GRANT COMPANY,	:	
Bankrupt,	:	NOTICE OF MOTION
PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated,	:	
Plaintiffs-Appellants,	:	
-against-	:	
CHARLES G. RODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,	:	
Defendant-Appellee.	:	

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PLEASE TAKE NOTICE that upon the annexed affidavit of Theodore Gewertz, the exhibits thereto and all papers and proceedings heretofore had herein, the undersigned will move the Part I Judge of this Court, in Room 506 of the Courthouse, Foley Square, New York, New York on the 14th day of September, 1976 at 10:30 A.M., or as soon thereafter as counsel may be heard, for an order pursuant to Rules 802 and 803 of the Rules of Bankruptcy Procedure dismissing plaintiffs' appeal from the order of the Bankruptcy Court dated July 26, 1976 and entered July 29, 1976 dismissing the amended complaint in this adversary proceeding, upon the ground that the notice of appeal herein was not timely filed.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 9(c)(2) of the General Rules of this Court, answering papers, if any, are

required to be served upon the undersigned on or before September 9, 1976.

Dated: New York, New York
August 30, 1976.

WACHTELL, LIPTON, ROSEN & KATZ
Special Counsel for Charles G.
Rodman, Trustee of the Estate of
W. T. Grant Company, Bankrupt

By *Thomas E. Grant*
A Member of the Firm

Office and Post Office Address:
299 Park Avenue
New York, New York 10017
Tel. No. (212) 371-9200

TO:

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AFFIDAVIT OF THEODORE GEWERTZ, ESQ., FOR
DEFENDANT-APPELLEE, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

In re	:	In Bankruptcy
	:	No. 75 B 1735
W. T. GRANT COMPANY,	:	
Bankrupt,	:	AFFIDAVIT IN SUPPORT
	:	OF MOTION TO DISMISS
PAUL S. BERGER, Trustee, and RONALD M.	:	APPEAL
LEE and SUTRO MORTGAGE INVESTMENT TRUST,	:	
individually and on behalf of all	:	
others similarly situated,	:	
Plaintiffs-Appellants,	:	
-against-	:	
CHARLES G. RODMAN, Trustee in Bank-	:	
ruptcy of W. T. GRANT COMPANY,	:	
Bankrupt,	:	
Defendant-Appellee.	:	

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STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

THEODORE GEWERTZ, being duly sworn, deposes and says that he is a member of the firm of Wachtell, Lipton, Rosen & Katz, special counsel for Charles G. Rodman, Trustee in Bankruptcy of W. T. Grant Company ("Grant"), Bankrupt, the defendant-appellee in the above-entitled purported adversary proceeding (the "Trustee"), and is fully familiar with the facts set forth herein.

1. This affidavit is submitted in support of the Trustee's motion to dismiss, as not timely filed, plaintiffs-appellants' appeal from the order of the Honorable John J. Galgay, Bankruptcy Judge, dated July 26, 1976 and entered on July 29, 1976, which order granted the Trustee summary judgment dismissing the

amended complaint herein for failure to state a claim against Grant upon which relief may be granted. (A copy of Judge Galgay's Memorandum Opinion containing within it the order appealed from is annexed hereto as Exhibit "A".)*

2. As set forth in the accompanying memorandum of law, Bankruptcy Rule 802(a) provides in relevant part that the notice of appeal from the Bankruptcy Court to the District Court "shall be filed with the referee [bankruptcy judge] within 10 days of the date of the entry of the judgment or order appealed from." In the present case, as noted, the order appealed from was entered on July 29, 1976. A copy of the page of the Docket Sheet maintained by the Bankruptcy Court showing the entry of such order on July 29, 1976 is annexed hereto as Exhibit "B". The relevant entry is the only entry for July 29, 1976 and has been underlined for the Court's convenience. That entry reads as follows:

7/29/76 Filed 'so ordered' Memorandum opinion
dated (7/26), re: Paul S. Berger
Trustee, and Ronald M. Lee and Sutro
Mortgage Investment Trust.

3. The notice of appeal filed by plaintiffs-appellants, dated August 11, 1976, was not filed until August 16, 1976 -- 18 days after entry of the July 29, 1976 date upon which the order appealed from was entered. (A copy of the notice of appeal showing -- as required by Bankruptcy Rule 804 -- the filing date to be August 16, 1976 is annexed hereto as Exhibit "C".) The Docket Sheet entry of the notice of appeal indicates that plaintiffs were notified that the notice of appeal was not timely filed. That

* Although not relevant upon this motion, the allegations of the amended complaint in this purported class action on behalf of all of the former landlords of Grant's stores and the relief sought by plaintiffs therein are summarized in Exhibit "A" hereto at pp. 2-7.

entry reads:

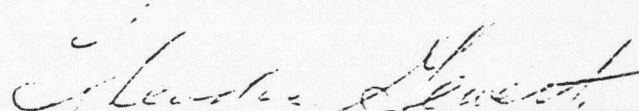
8/16/76 Filed notice of appeal by attorneys for Paul S. Berger, Trustee and Ronald M. Lee and Sutro Mortgage Investment Trust, re: order dated 7/26, entered 7/29/76. Notified of late filing and \$10.00 filing fee. Sent notice of 806. Copy sent to attorneys for Bankrupt.

(A copy of the relevant Docket Sheet page with the above entry underlined is annexed hereto as Exhibit "D".) No extension of time to file the notice of appeal beyond the 10-day period provided for by Bankruptcy Rule 802 has been sought or granted.

4. Bankruptcy Rule 803 provides that "[u]nless a notice of appeal is filed as prescribed by Rules 801 and 802, the judgment or order of the referee shall become final."

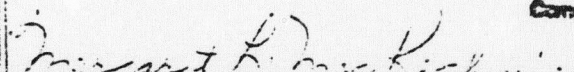
5. By reason of the foregoing, the order appealed from became final at the end of August 9, 1976 (the order would have become final at the end of August 8, 1976 -- the tenth day after entry of such order -- were it not for the fact that August 8, 1976 was a Sunday) and was no longer subject to review thereafter; the notice of appeal was not timely filed; and plaintiffs-appellants' appeal must be dismissed.

WHEREFORE, your deponent respectfully requests that an order be entered dismissing plaintiffs-appellants' appeal and that the Trustee have such further and different relief as the Court may deem just.


Theodore Gewertz

Sworn to before me this

36th day of August, 1976.


Notary Public

MARGARET L. MAC KINNON
Notary Public, State of New York
No. 24-4814373
Qualified in Ulster County
Commission Expires March 30, 1977

SA-6

EXHIBIT "A" TO GEWERTZ AFFIDAVIT - MEMORAN-
DUM OPINION OF JUDGE GALGAY (reproduced at pages
A-20 - A-34 of Appendix)

SA-7

EXHIBIT "B" TO GEWERTZ AFFIDAVIT - PAGE OF
BANKRUPTCY COURT DOCKET SHEET (reproduced at
page A-48 of Appendix)

SA-8

EXHIBIT "C" TO GEWERTZ AFFIDAVIT - NOTICE OF
APPEAL (reproduced at pages A-37 - A-38 of Appendix)

SA-9

EXHIBIT "D" TO GEWERTZ AFFIDAVIT - PAGE OF
BANKRUPTCY COURT DOCKET SHEET (reproduced at
page A-52 of Appendix)

AFFIDAVIT OF DIRK GOULD, ESQ., FOR PLAINTIFFS,
IN OPPOSITION TO MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

In Re	:	
W. T. GRANT COMPANY,	:	
Bankrupt,	:	In Bankruptcy No. 75 B 1735
PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated,	:	
Plaintiffs-Appellants,	:	<u>AFFIDAVIT</u>
- against -	:	
CHARLES G. RODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,	:	
Defendant-Appellee.	:	

-----x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

I, DIRK S. GOULD, being duly sworn, depose and say:
I am an officer of Alter, Lefevre, Raphael, Lowry &
Gould, P.C., associate counsel for plaintiffs in the above class
action and am fully familiar with the facts in this proceeding.
I submit this affidavit in opposition to the motion by defendant-
appellee for an order dismissing plaintiff's appeal from the
order of the Bankruptcy Court entered July 29, 1976, which
dismissed the amended class action complaint in this proceeding.

The facts and circumstances relating to this motion are as follows:

On August 5, 1976, the undersigned received from Irma Skoller, Secretary to Judge Galgay, a letter dated August 2, 1976 notifying the undersigned that the Court had entered an opinion order regarding this case. Such letter may have been sent in compliance with Rule 922; however, such rule requires that notice of entry of an order must be served immediately upon the entry of such order. The notice of entry here was not mailed until three days after the entry of the order and not received by deponent's firm until seven days after the entry of the order. It is my understanding that a copy of said letter dated August 2, 1976 was also mailed to Berger, Berger & Kahn, counsel for plaintiffs, but not received by them in California until August 9, 1976.

Upon receipt of the letter, an associate of this firm obtained a copy of the opinion from the Clerk's office which was then forwarded that same day to plaintiffs for their information and for a determination by them as to whether and what further proceedings should be taken.

On August 11, 1976, two days after receipt by them of the notice of entry and the copy of the opinion order, California counsel mailed a notice of appeal from the order dismissing the complaint. Thus the notice of appeal was mailed within two days

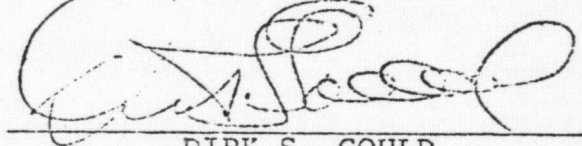
after receipt of the notice of entry by California counsel (within seven days after receipt by New York associate counsel) and within twelve days after the entry of the order. However, such notice of appeal apparently was not filed by the Clerk until August 16, 1976; it is unclear when the notice of appeal was actually received by the Clerk. Surely any delay in the filing of the notice by the Clerk should not be charged against plaintiffs.

As the affidavit of Jon Moss, an associate of the firm of Berger, Berger & Kahn, attorneys of record for plaintiff in this action, also submitted in opposition to this motion shows, Plaintiffs throughout these proceedings have made diligent and persistent efforts to have the Bankruptcy Court rule on the motion to dismiss. Such order dismissing the complaint was not entered until four and one-half months after the motion was argued in March, 1976. It is submitted that under such circumstances, to have the appeal dismissed for a few days unintentional delay in the filing of the notice of appeal (occasioned by lack of prompt notice) would be a gross miscarriage of justice.

In any event, plaintiffs have made an application, on order to show cause returnable on September 13, 1976 before the Honorable John J. Galgay, for an extension of time to file the notice of appeal to and including August 16, 1976, the date on

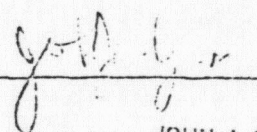
which the notice of appeal was actually filed by the Bankruptcy Clerk. Rule 802(c) of the Bankruptcy Rules permits an extension of time to file an appeal even where application is made after the expiration of the original time to appeal upon a showing of excusable neglect. A copy of the order to show cause and the affidavit in support of such application is attached hereto as Exhibit A. For such reason and until and unless Judge Galgay denies the application for an extension, defendant's application to this Court for an order dismissing the appeal is premature and should be denied.

WHEREFORE, deponent respectfully requests that the motion to dismiss the appeal be denied in all respects.



DIRK S. GOULD

Sworn to before me this
7th day of September, 1976



JOHN J. FLYNN III
Notary Public, State of New York
No. 651320 Qual. in Westchester County
Cert. Filed in New York County
Commission Expires March 30, 1978

SA-14

EXHIBIT "A" TO GOULD AFFIDAVIT - ORDER TO
SHOW CAUSE AND AFFIDAVIT IN SUPPORT OF
APPLICATION FOR EXTENSION OF TIME TO FILE
APPEAL (reproduced at pages A-13 - A-19 of Appendix)

AFFIDAVIT OF JON MOSS, ESQ., FOR PLAINTIFFS, IN
OPPOSITION TO MOTION

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	In Bankruptcy
W. T. GRANT COMPANY,	)	
	)	CASE NO: 75-B-1735
Bankrupt,	)	
	)	
PAUL S. BERGER, Trustee, and	)	AFFIDAVIT IN OPPOSITION
RONALD M. LEE, individually and	)	TO MOTION TO DISMISS
on behalf of all others	)	APPEAL
similarly situated, and SUTRO	)	
MORTGAGE INVESTMENT TRUST,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
W. T. GRANT COMPANY,	)	
	)	
Defendants.	)	

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

I, JON MOSS, being duly sworn, say:

1. I am an associate in the firm of BERGER, BERGER,
KAHN & SHAFTON, one of the attorneys of record for the plaintiffs
in this class action, and am fully familiar with the facts set
forth herein.

2. This action was commenced with the filing of a
complaint on January 8, 1976. Summons was issued and the matter
noticed for trial on March 3 and 4, 1976. Defendant, W. T. Grant

Company moved for dismissal of the complaint, setting the hearing date on the motion for March 16, 1976, thus necessitating the adjournment of the scheduled trial date.

3. At all times herein, plaintiffs have diligently striven to obtain an early resolution of the important constitutional and other issues involved - both for the benefit of plaintiffs, themselves, and for the benefit of the defendant and its unsecured creditors.

4. Notwithstanding plaintiffs' efforts to expedite this matter, they were met with a complete and unremitting pattern of frustration and delay, as follows:

A. Following argument on the motion to dismiss - despite the fact that no evidence had been taken and plaintiffs had been enjoined from all discovery - the bankruptcy Judge requested findings of fact and conclusions of law to be prepared, first by Grant, then by plaintiffs.

Plaintiffs submitted their proposed findings on the same date Grant's were due, in order to hasten the court's decision.

Two months later, no decision having been made by the bankruptcy court, plaintiffs applied to this court for an Order to Show Cause why an Order Granting Relief in the Nature of Mandamus should not be entered requiring the bankruptcy court to, among other things, rule on the Motion to Dismiss the Complaint. A copy of the Order to Show Cause is attached hereto as Exhibit "A".

On June 8, 1976 - the return date specified by the Order to Show Cause - this court, by the Honorable Lee F. Gagliardi, heard the arguments and took the matters under submission.

On July 27, 1976, following several unsuccessful telephone attempts to ascertain when a ruling might be expected, I wrote a letter to Judge Gagliardi, requesting him to act. A copy of my letter is attached hereto as Exhibit "B".

This court has never - to my knowledge - ruled.

B. On or about February 17, 1976, plaintiffs noticed their Motion to be Certified as a Class Action to be heard on March 3, 1976.

On March 3, 1976, over objection, the Motion was adjourned to March 30, 1976.

On March 30, 1976, over objection, the Motion was adjourned to April 14, 1976.

On April 14, 1976, over objection, the Motion was adjourned to June 15, 1976.

On June 15, 1976, the Motion was heard, but the defendant was granted additional time to file briefs.

The Bankruptcy Court has never ruled on the Motion, nor - as pointed out above - has this court ruled on the question of whether the Bankruptcy Court should be mandated to do so.

C. On or about February 17, 1976, plaintiffs noticed a Motion for a bond to protect the class from damages suffered by reason of the court's injunctions. Hearing on the Motion was adjourned from March 3, 1976 to March 16, 1976, when the court purported to deny the Motion, but made no order. On June 8, 1976, the court signed an order, nunc pro tunc as of March 16, 1976, denying the Motion. A copy of the order is attached hereto as Exhibit "C".

Plaintiffs filed their Notice of Appeal and Designation of Records and Issues on Appeal on or about March 23, 1976. Defendant filed a Designation of Additional Papers to be included in Record on Appeal and Counterstatement of Issues on or about April 5, 1976.

The Bankruptcy Court has either failed and refused to transmit the Record on Appeal to this court or - if it has done so - has failed to inform plaintiffs of that action.

This court, as pointed out above, has failed to rule

on the question of whether the Bankruptcy Court should be mandated to do so.

5. On Monday, August 9, 1976, I received a copy of a letter from Irma Skoller, the Bankruptcy Judge's secretary, stating:

"The court has entered an opinion regarding the above.

It is 'so ordered'. A copy of the opinion may be obtained in the clerk's office, Room 250."

A copy of the letter is attached hereto as Exhibit "D".

The letter fails to inform the addressees which matter pending before the Bankruptcy Court has finally been ruled upon.

The letter also fails to inform the addressees of the nature of the ruling - i.e. which party won or lost. Plaintiffs had fully expected that any decision based upon the law would be in their favor.

More importantly, the letter fails to inform the addressees that the mysterious order HAD BEEN ENTERED THE PREVIOUS WEEK.

Thus, the Appellees and, presumably, the Bankruptcy Court, seek to insist the strict requirements of Rule 802 be met, imposing the burden on plaintiffs of responding to a secretly entered order within the prescribed time limits.

6. Some of the issues raised by the appeal herein concern the Due Process requirements of the Constitution, as contrasted with various provisions of the Bankruptcy Rules. This would appear to be yet another example of the deficiencies complained of.

Plaintiffs submit that - even in the Kafkaesque world of the Bankruptcy System - due process does not permit the court to start the time period without notifying the affected parties, especially where the time period is so short. Otherwise, the

time within which to notice an appeal could expire well before any party knew it had even started!

The problem is further exacerbated by the failure of the Bankruptcy Rules to incorporate F.R.C.P. §6(e), which adds three days to the prescribed period when notice has been served by mail. Further, although Rule 705 incorporates the provision of F.R.C.P. §5(b) - that service by mail is complete upon mailing - Rule 802, strictly read, requires the notice of appeal to be filed with the referee within 10 days.

Thus, although the Notice of Appeal herein was mailed within 10 days of the presumed filing date of the order - the date of the letter (Exhibit "D") - it was not filed until the following Monday.

Strict construction of the Rule, then, coupled with delays in the mails and in the Bankruptcy Court itself, could make it impossible to timely file a Notice of Appeal by mail!

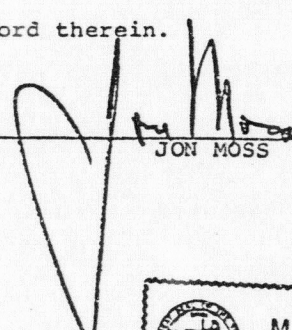
7. No authority need be cited for the proposition that the Bankruptcy Court is a Court of Equity. Proceedings therein are to be - in a word - equitable: "Just, conformable to the principles of justice and right." (Black's Law Dictionary, Fourth Edition, West Publishing Co., St. Paul, Minn., Page 632).

In view of the demonstrable fact that it has been plaintiffs, at all stages of the proceedings, who have attempted to move this matter forward - even to the point of seeking extraordinary relief to compel a decision - and the fact that I was not even informed of the decision appealed from until well after the order had been entered, so that the day I did receive notice IT WAS ALREADY TOO LATE, under a strict reading of Rule 802, it is submitted that it would be manifestly unjust and inequitable to grant the motion to dismiss the appeal.

Due Process requires a reasonable opportunity to notice an appeal. I believe the record shows that, under the circumstances,

the appeal was noticed within a reasonable time. Moreover, it is submitted that plaintiffs should be allowed to have the important Constitutional and other issues resolved by decision rather than avoided by subterfuge.

WHEREFORE, Deponent respectfully urges that the Motion to Dismiss the Appeal be denied and that the Bankruptcy Court be required to transmit the record therein.


JON MOSS

Sworn to before me this
2nd day of September, 1976.

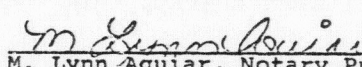

M. Lynn Aguiar, Notary Public



EXHIBIT "A" TO MOSS AFFIDAVIT - ORDER TO
SHOW CAUSE WHY ORDER GRANTING RELIEF IN
THE NATURE OF MANDAMUS SHOULD NOT BE
ENTERED

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Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:

W. T. GRANT COMPANY,

Bankrupt,

PAUL S. BERGER, Trustee, and RONALD
M. LEE, individually and on behalf
of all others similarly situated,
SUTRO MORTGAGE INVESTMENT TRUST,

Petitioners,

vs.

JOHN J. GALGAY, Bankruptcy Judge,

Respondent,

CHARLES G. RODMAN, Trustee,

Real Party in Interest.

CASE NO: 75-B-1735

ORDER TO SHOW CAUSE

At New York, New York, in said District on the 26th
day of May, 1976.

Upon the annexed Affidavit of JON MOSS, sworn to May 26th
1976, the Exhibits thereto, sufficient cause appearing therefor,

It is now, upon application of BERGER, BERGER & KAHN and ALTER, LEFEVRE, RAPHAEL, LOWRY & GOULD, P.C., attorneys for Plaintiffs and Petitioners,

ORDERED, that Respondent JOHN J. GALGAY, Bankruptcy Judge and CHARLES G. RODMAN, Trustee, Real Party In Interest, show cause before the Honorable ~~CHARLES L. BRIANT, JR.~~ ^{PART I} Judge of this Court, in Room 506 of this Courthouse, Foley Square, New York, New York, on the 8th day of June, 1976, at 10:15 A.M., or as soon thereafter as counsel may be heard, why an Order Granting Relief in the Nature of Mandamus should not be entered requiring Respondent to:

1. Rule on the Motion to Dismiss the Complaint.
2. Rule on the Motion of SUTRO MORTGAGE INVESTMENT TRUST to join as a named Plaintiff.
3. To hear and rule on the Motion to be Certified as a Class Action.
4. To either grant a Bond or other surety, as requested in Petitioners' Motion therefor, or to sign and enter an Order Denying said Bond and forward the record on Appeal to the District Court within two days.
5. To enter an Order Nunc Pro Tunc as of January 8, 1976, deeming any Orders, waivers, or claims made or filed in the Bankruptcy Court affecting the rights of members of the class to seek the relief sought by the Complaint herein amended, so that members of the class may be entitled to the relief sought by this Complaint unless and until they knowingly and intelligently and with knowledge of this action, waive and give up those rights.

6. To sequester, until the rights of Plaintiffs and the members of the class they represent are finally determined, sufficient funds from the estate to pay said administrative expenses.

IT IS FURTHER ORDERED, that service of a copy of this Order and of the papers on which it is made, by delivery on ~~or~~ before the 26 day of May, 1976, upon JOHN J. GALGAY, Bankruptcy Judge, Room 234, U.S. Courthouse, Foley Square, New York New York, and by ~~mail~~ ^{Delivery} on or before the 1st day of June, 1976, upon CHARLES G. RODMAN, Trustee, or his attorneys, and by mailing an additional copy, shall be deemed good and sufficient service of this Order to Show Cause and said papers.

DATED: May 26, 1976, at New York, New York

Joined at 2:10 P.M.

Charles L. Briant Jr.
CHARLES L. BRIANT, JR.,
Judge, United States District
Court, Southern District of
New York.

EXHIBIT "B" TO MOSS AFFIDAVIT - LETTER FROM
MOSS TO JUDGE GAGLIARDI DATED JUNE 27, 1976

July 27, 1976

Honorable Judge Gagliardi
United States District Court
Foley Square
New York, New York 10007

Re: W. T. GRANT COMPANY - Bankruptcy

Dear Judge Gagliardi:

You will recall that I appeared before you on June 8th, 1976, on my Motion for Relief in the nature of Mandamus, seeking an Order Requiring Bankruptcy Judge Galgay to rule upon, among other things, a Motion to Dismiss which had been - at that time - fully submitted and pending before him for well over two months.

It is not without a sense of irony that I must call your attention to the fact that you have had my Motion under submission for seven weeks.

The relief sought by my Motion - to compel a ruling by Judge Galgay - is extraordinary relief and, as such, was not requested lightly.

Accordingly, if such relief is available in your Court, I would appreciate your early attention to this matter. On the other hand, if such relief is not available, I would appreciate knowing.

Respectfully,

JON MOSS for
Berger, Berger & Kahn

JM:rts

cc: Theodore Gewertz
Dirk S. Gould

EXHIBIT "C" TO MOSS AFFIDAVIT - ORDER DENY-
ING MOTION FOR BOND TO PROTECT CLASS FROM
DAMAGES SUFFERED BY REASON OF COURT'S
INJUNCTIONS

BERGER, BERGER & KAHN
9454 Wilshire Boulevard
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(213) 273-8380

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(212) 687-4426

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	)	In Proceedings for an
W. T. GRANT COMPANY,	)	Arrangement-Chapter XI
	)	
Debtor,	)	No: 75-B-1735
	)	
PAUL S. BERGER, Trustee	)	ORDER NUNC PRO TUNC AS
and RONALD M. LEE, in-	)	OF MARCH 16, 1976.
dividually and on behalf	)	
of all others similarly	)	
situated,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
W. T. GRANT COMPANY,	)	
	)	
Defendants.	)	

The Motion of PAUL S. BERGER, Trustee, and RONALD
M. LEE, for an Order Requiring W.T. GRANT COMPANY to post
Bond or other sufficient securities to indemnify Plaintiffs
against losses or damages suffered by reason of the continued
maintenance of the injunction preventing Plaintiffs from

bringing actions to enforce their leases or to obtain damages for the breach thereof and/or any losses or damages suffered by Plaintiffs due to Defendant's inability to pay any amounts of administrative rent found to be due and owing to Plaintiffs, having come on for Hearing before this Court on March 16, 1976, PAUL S. BERGER, Trustee, and RONALD M. LEE, appearing by JON MOSS for BERGER, BERGER & KAHN, and Defendant W. T. GRANT COMPANY appearing by THEODORE GEWERTZ for WACHTELL, LIPTON, ROSEN & KATZ, and the Court having considered the Motion and Memorandum of Points and Authorities and oral argument,

IT IS HEREBY ORDERED that said Motion of Plaintiffs, PAUL S. BERGER, Trustee and RONALD M. LEE, is hereby denied, and

FURTHER ORDERED that this Order be entered Nunc Pro Tunc as of March 16, 1976.

DATED: March 17, 1976

John J. Galgay
JOHN J. GALGAY,
Bankruptcy Judge.

SA-27

EXHIBIT "D" TO MOSS AFFIDAVIT - LETTER FROM
IRMA SKOLLER, BANKRUPTCY JUDGE'S SECRETARY,
TO MOSS DATED AUGUST 2, 1976 (reproduced at page
A-101 of Appendix)

REPLY AFFIDAVIT OF THEODORE GEWERTZ, ESQ.,
FOR DEFENDANT-APPELLEE, IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re	:	In Bankruptcy
	:	No. 75 B 1735
W. T. GRANT COMPANY,	:	
Bankrupt,	:	REPLY AFFIDAVIT
PAUL S. BERGER, Trustee, and RONALD M. LEE and SUTRO MORTGAGE INVESTMENT TRUST, individually and on behalf of all others similarly situated,	:	
Plaintiffs-Appellants,	:	
-against-	:	
CHARLES G. RODMAN, Trustee in Bankruptcy of W. T. GRANT COMPANY, Bankrupt,	:	
Defendant-Appellee.	:	

----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

THEODORE GEWERTZ, being duly sworn, deposes and says that he is a member of the firm of Wachtell, Lipton, Rosen & Katz, special counsel for Charles G. Rodman, Trustee in Bankruptcy of W. T. Grant Company ("Grant"), Bankrupt, the defendant-appellee in the above-entitled purported adversary proceeding (the "Trustee"), and is fully familiar with the facts set forth herein.

1. This affidavit is submitted in reply to the affidavit of Jon Moss, one of plaintiffs-appellants' California attorneys, sworn to September 2, 1976 ("Moss Affidavit"), which Moss Affidavit was itself submitted in opposition to the Trustee's motion to dismiss, as not timely filed, plaintiffs-appellants' appeal.

2. The bulk of the Moss Affidavit is devoted to yet another repetition of a number of their already rejected assertions with respect to the proceedings below which antedated the entry of the order and judgment appealed from. See Moss Affidavit, ¶¶ 2-4. Quite apart from their lack of accuracy,* these assertions are simply irrelevant to the narrow issues presented by the instant motion to dismiss the appeal.

3. The sole basis upon which plaintiffs-appellants seek to avoid dismissal of their admittedly untimely appeal is their assertion, in the form of an "excuse", that a letter from the office of Bankruptcy Judge Galgay dated August 2, 1976 advising all counsel of the entry of the order (see Exhibit "D" to Moss Affidavit) was supposedly not received by plaintiffs-appellants' California counsel until Monday, August 9, 1976 -- at a time when California counsel claims it was already too late to file a timely notice of appeal. Such "excuse" to validate plaintiffs-appellants' invalid appeal is legally immaterial and insufficient, and in any event, is at variance with the facts.

4. Thus, plaintiffs-appellants' claim that they supposedly received late notice of the entry of the order appealed from is immaterial and legally insufficient. Rule 922(a) of the

* Thus, for example, the Moss Affidavit asserts that Judge Gagliardi has never ruled upon plaintiffs-appellants' mandamus petition. See Moss Affidavit, ¶¶ 4A and 4B. Contrary to such assertion, Judge Gagliardi has in fact long since ruled on such petition by denying it by endorsement opinion and order dated July 29, 1976, holding that "there is absolutely no justification" for the relief sought. (A copy of Judge Gagliardi's opinion and order is annexed hereto as Exhibit "A".)

Bankruptcy Rules expressly provides:

(a) Judgment or Order of a Referee.
Immediately upon the entry of a judgment or order made by him, the referee shall serve a notice of the entry by mail in the manner provided by Rule 705 upon any party who opposed the making of the judgment or order and on such other persons as may be designated by the referee. The service of such notice shall be noted in the referee's docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 802.
(Emphasis supplied.)

Thus, even if, contrary to fact, no notice of entry of the order appealed from had been given to plaintiffs-appellants or such notice was given too late to enable plaintiffs-appellants to make a timely filing, such lack of notice would not authorize this Court to consider their untimely filed appeal as timely. Plaintiffs-appellants' only remedy was to seek an extension of time from the Bankruptcy Court pursuant to Rule 802. For this reason alone, plaintiffs-appellants' "excuse" is legally insufficient to validate their invalid notice of appeal.

5. Moreover, the contention that counsel for plaintiffs-appellants were not notified of the entry of the order until it was too late to file a timely notice of appeal, is belied by the August 2, 1976 letter from the office of Bankruptcy Judge Galgay (Exhibit "D" to Moss Affidavit), which California counsel claims that he did not receive until August 9, 1976, the last day to file such a timely notice of appeal. In complaining about such supposed late notice and the United States mails, California counsel

conveniently omits to inform the Court that along with California counsel, plaintiffs-appellants are and have been actively represented by New York counsel* -- the firm of Alter, LeFevre, Raphael, Lowry & Gould -- and that the August 2, 1976 letter on its face was specifically addressed to that firm and Dirk S. Gould, Esq., the partner of that firm in charge of the case, who admittedly received such letter and obtained the order appealed from on August 5, 1976. See ¶ 7, infra. Thus, it would have been a simple matter for such counsel to prepare and file a timely notice of appeal by August 9, 1976. (For the sake of clarity, a copy of the August 2, 1976 letter from the office of the Bankruptcy Court addressed to the attorneys for all parties is annexed hereto as Exhibit "B".)

6. Moreover, even assuming, arguendo, that plaintiffs-appellants had a legitimate reason for not having timely filed their notice of appeal, their remedy was not to seek to excuse such late filing before this Court. See ¶ 4, supra. Rather, the Bankruptcy Rules give a litigant the right to seek an extension from the Bankruptcy Judge (referee) within which to file such appeal. Thus, Bankruptcy Rule 802(c) provides:

(c) Extension of Time for Appeal. The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale or any property. (Emphasis supplied.)

* See Rule 3(c) and Rule 4(a) of the General Rules of this Court.

Although plaintiffs-appellants could have sought an extension of time to file their notice of appeal up to and including August 30, 1976, no such extension was sought by them by that time. This, despite the fact that, as shown in your deponent's original moving affidavit herein (§ 3), plaintiffs-appellants were notified by the Bankruptcy Court long before August 30, 1976 that their notice of appeal had not been timely filed. Significantly, the Moss Affidavit makes no mention of and does not even attempt to "excuse" this failure of plaintiffs-appellants to attempt to seek an extension to file a timely notice of appeal.

7. Subsequent to the making of this motion, however, and subsequent to the service of the Moss Affidavit, plaintiffs-appellants allowed their New York counsel to surface for the purpose of making a motion before Bankruptcy Judge Galgay for a nunc pro tunc extension to August 16, 1976 of the time within which to file their appeal. While the issues presented by such belated and untimely motion are not before this Court upon the instant motion, such motion for an "extension" further underscores the baseless nature of plaintiffs-appellants' opposition to this motion and their cynical attempt to mislead this Court. Thus, in such "extension" motion plaintiffs-appellants' New York counsel admits that he received the August 2, 1976 letter from Judge Galgay's office on August 5, 1976 and obtained on that day a copy of the order appealed from. (A copy of plaintiffs-appellants' motion papers to the Bankruptcy Court seeking an extension is annexed hereto as Exhibit "C".) It can be seen then that by their own admission, plaintiffs-appellants had in fact been notified of the order

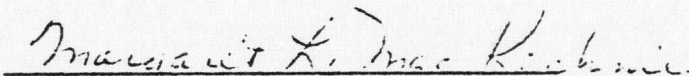
appealed from in ample time to file a timely notice of appeal, or at the very least, to timely seek an extension of time within which to file such appeal.

WHEREFORE, your deponent respectfully requests that an order be entered dismissing plaintiffs-appellants' appeal and that the Trustee have such further and different relief as the Court may deem just.


Theodore Gewertz

Sworn to before me this

16th day of September, 1976.


/Notary Public

MARGARET L. Mac KICHNIE
Notary Public, State of New York
No. 24-4814373
Qualified in Kings County
Commission Expires March 20, 1977

EXHIBIT "A" TO GEWERTZ REPLY AFFIDAVIT -
OPINION AND ORDER OF JUDGE GAGLIARDI

Endorsement

Berger v. Galgay, 75 B. 1735

Petitioners' request that this court order Bankruptcy Judge Galgay to rule on a motion to dismiss their complaint in a matter relating to the bankruptcy of the W.T. Grant Company is denied.

A trial judge has the inherent power to control the disposition of his calendar--particularly in a complex matter such as the bankruptcy of a corporation with hundreds of millions of dollars of assets.

At the time this application was made the motion to dismiss had been pending before Judge Galgay for slightly over two months. In light of the extensive affidavits and complex issues of law which may be involved on the motion, there is absolutely no justification for the extraordinary relief which petitioners here seek.

MICROFILM

JUL 30 1976

7/29/76

So Ordered

[Signature]
U.S.D.J.

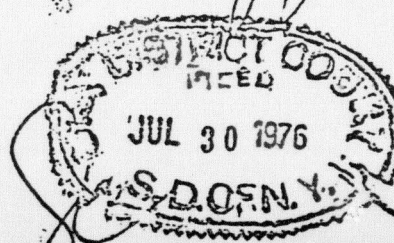


EXHIBIT "B" TO GEWERTZ REPLY AFFIDAVIT -
LETTER FROM BANKRUPTCY COURT TO ATTORNEYS
FOR ALL PARTIES DATED AUGUST 2, 1976 (reproduced
at page A of Appendix)

EXHIBIT "C" TO GEWERTZ REPLY AFFIDAVIT -
ORDER TO SHOW CAUSE AND AFFIDAVIT IN SUPPORT
OF APPLICATION FOR EXTENSION OF TIME TO FILE
APPEAL (reproduced at pages A-13 - A-19 of Appendix)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Robert Bisulco, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 123 1/2 Chrystie St.
New York, N.Y. 10002

That on the 8th day of APRIL, 19 77,
deponent personally served the within SUPPLEMENTAL APPENDIX

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 1 true ^{copy} ~~copies~~ of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

WACHTELL, LIPTON, ROSEN & KATZ
Attorneys for Defendant-Appellee
299 Park Ave.
New York, N. Y. 10017

Robert Bisulco

Sworn to before me this

8th day of APRIL, 19 77.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979